

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

In the Matter of Petition for Arbitration of an
Interconnection Agreement Between Charter
Fiberlink MA-CCO, LLC, and Verizon-
Massachusetts Inc.

D.T.E. Docket No. 06-56

**OPPOSITION OF VERIZON NEW ENGLAND
TO CHARTER'S MOTION TO COMPEL**

Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon MA") hereby opposes the motion of Charter Fiberlink MA-CCO, LLC, ("Charter") to compel further responses to its data requests to Verizon MA. Verizon MA has already produced to Charter all relevant, readily available data in response to Charter's Requests. Most of the additional data Charter now seeks has no bearing on the issues before the Department in this proceeding and are beyond the scope of discovery. To the extent that some of that data might possibly be relevant or lead to the discovery of admissible evidence, and thus fall within the boundaries of permissible discovery, its production would require resource-intensive special studies, and any probative value of that data is far outweighed by the unfair and undue burden its production would impose on Verizon MA. The short time frame the Act allows in which to complete this arbitration indicates that such burdensome discovery demands are inappropriate in this type of proceeding. The Department should deny the motion. Verizon MA's responses to Charter's motion as to particular Requests follows.¹

¹ The motion claims, at 2, that "Charter's representatives have attempted to resolve their dispute with Verizon's representatives." In fact, Charter did not attempt to discuss these discovery issues with Verizon MA until about 1:30 p.m. on August 21, when Charter's attorney left a voice message and sent an email to a Verizon MA

Data Request 1.1

Charter objects to Verizon MA's refusal to provide the names of the other LECs with whom it has built fiber meet arrangements in Massachusetts and the location of those arrangements. But Charter's Request 1.1 doesn't ask for the names of those companies. Rather, it asks only that Verizon MA identify them by category – "i.e. local exchange carrier, interexchange carrier, or other entity." Verizon MA has done that, identifying the four relevant carriers as local exchange carriers. *See* Verizon MA Response to Charter 1.1. In any event, the names of Charter's competitors that use fiber meet arrangements and the location of those arrangements is potentially valuable competitive information that could help Charter assess the relative competitive strengths and geographic areas of focus of its competitors. Certainly, those competitors may deem such information as confidential, proprietary and commercially valuable. Thus, the Department should protect that data from disclosure.

Charter claims that, "it is obviously impossible to assess whether Verizon's proposed conditions in this case meet Verizon's nondiscrimination obligation without this information." Motion at 6. The names of other carriers with fiber meet points has no bearing on any such issue, however, and the street address of the eight existing fiber meet points in Massachusetts doesn't tell Charter whether Verizon MA requires similar contract terms of other carriers. Indeed, Charter could have learned whether existing fiber meet amendments include terms requiring that the POI fall within the 3-mile and 500-foot distance limitations that Verizon MA has found to be necessary merely by asking for that specific information. *See e.g.* DTE VZ 1-14 and Verizon's response thereto.

attorney. That attorney was out of the office, however, and did not receive the message or email until after 5 p.m. that evening, by which time Charter had already filed and served the motion.

Data Requests 1.8 and 1.9

Charter's motion seeks to compel Verizon MA to answer whether Verizon MA has established any fiber meet point arrangements before Verizon MA and the other LEC were exchanging a DS-3's worth of traffic and, if so, to identify such instances. But Verizon MA has already answered that it does not track or retain data showing the amount of traffic exchanged between it and such other carriers at a given historical point in time in a way that would enable the company to answer Charter's questions. In order to answer this request, Verizon personnel would first have to research the dates on which it established its fiber meet arrangements around the nation. Using that information, Verizon personnel would then have to determine what records, if any, it may have that could be used to reconstruct or estimate the volume of traffic being exchanged between Verizon and the other carrier as of that date. Then Verizon would have to reconstruct that data. Given the time constraints on this proceeding, and Congress's anticipation that arbitrations such as this one should be completed within about four and a half months, there is no basis to require Verizon MA to go to such great lengths to provide this data here.²

Moreover, Charter's claim that this information is relevant to the question of whether Verizon MA's proposed traffic thresholds are non-discriminatory, Motion at 7, has no basis. Whether Verizon has in the past agreed to build fiber meet points without such restrictions in no way precludes Verizon MA from learning from experience and attempting to improve its

² The Arbitrator has recently stated that, should Charter's motion to compel be allowed, Verizon MA would be required to produce additional data immediately. Verizon MA concludes that the Arbitrator's statement was not intended to apply where the basis for the producing party's objection is undue burden or the need for a special study. Otherwise, the threat of immediate production would require a party asserting such an objection to nevertheless bear the undue burden and perform all special studies while a motion to compel is pending (including, as here, where the objection is meritorious), in order to be prepared to produce the requested data immediately in the event the motion is allowed. Of course, if the data has to be gathered in any event, there would never be any reason to assert the objection in the first place, and the right to object on such grounds would effectively be abolished. Verizon MA does not think the Arbitrator intended such a result.

efficiency in the future. Verizon MA notes that it is providing data in this proceeding in response to DTE-VZ 1-10 regarding its current negotiating position in this regard and whether it has sought to impose (and has imposed) similar restrictions on other carriers.

Data Request 1.10

Verizon MA is providing additional proprietary data in response to this request, in part based on Charter's statement in the motion that this request "does not seek information outside of Massachusetts" which is not apparent from the text of the Request. This additional data will be made available to Charter once the parties sign an appropriate protective agreement.

Data Requests 1.11 and 1.12

These requests demand that Verizon MA identify all OC3 circuits throughout its footprint that now, or at any time in the past, have carried traffic volume below a DS3 level. As such these requests and Charter's motion seem intentionally designed to harass Verizon MA by imposing an enormous research burden on the company. This case does not concern OC3 circuits in general but fiber meet arrangements in particular.

Verizon has deployed thousands of OC3 circuits in Massachusetts alone. As Verizon MA stated in its Response to Request 1.12, it is not possible to provide the requested information with respect to those OC3 systems that are used to provide point-to-point special access services to customers. As to those circuits deployed to service Verizon MA's own needs, Verizon MA does not track the traffic data Charter seeks. In order to identify which circuits, if any, have ever carried less than a DS3's worth of traffic, Verizon MA would have to try to find a way to unearth the traffic history recorded by each of Verizon's switches and associate that traffic history with each OC3 circuit in its footprint. Many, if not most of those switches, however, do not record local calls (because few customers are billed on a per-call basis), so that the necessary

information does not exist. For those OC3 circuits served by switches that do record such data, it would take an enormous amount of time and resources to perform such usage studies for Massachusetts alone. This proceeding does not afford either Verizon MA or Charter the luxury of that time.

Charter blithely alleges that, “a special study is [not] required, but in fact Verizon can respond to these requests through a query of network and traffic engineers....” Charter, of course, has no basis for such rampant speculation. While a query of such engineers would form a small part of a special study, the fact remains that those engineers would be unable to respond to the query without significant time and effort. As Verizon MA has stated, “it does not routinely measure traffic over its fiber transport systems nor does it maintain usage studies of those systems....” Verizon MA Responses to Requests 1.12 and 1.13.

In addition, the data Charter seeks is only tangentially relevant to this case at best. Whether Verizon MA’s network contains any OC3 circuits that at one time or another have carried less than a DS3’s worth of traffic is beside the point, because Verizon MA has not proposed terms here that would require Charter to have a DS3’s worth of traffic before Verizon would build a fiber meet point. To the contrary, the terms proposed by Verizon MA would allow Charter to request a fiber meet point when it has only 70% of a DS3’s worth of traffic volume, that volume is expanding at 8% a month and Charter projects in good faith that it will have a DS3’s worth of traffic within a year. *See* Response of Verizon Massachusetts to Charter Petition, Exhibit 2, § 2.1.2, at 2. Charter’s Requests thus take aim at the wrong target. Furthermore, where Verizon MA underutilizes its own OC3 circuits, it is Verizon MA that suffers the consequences, in the form of underutilized assets. How often that occurs has no bearing on the issue at hand in this case, *i.e.* whether Verizon MA should be required to build a

fiber meet arrangement with Charter where *Charter*, not Verizon, controls whether Verizon MA's investment in facilities will prove to be efficient or inefficient.

Data Request No. 1.16

Verizon MA's marketing campaigns "over the last five years" have no bearing on any issue in this proceeding. Charter claims that such data "is relevant to the question of whether Charter's marketing efforts are the sole contributor" to the amount of traffic that would be exchanged over a fiber meet. The information sought, however, wouldn't answer that question. Whether Verizon engaged in a particular marketing effort in 2003, for example, would have no effect on the traffic Charter would be expected to carry over a fiber meet point in 2006-2007.

More generally, Verizon MA can agree that it has engaged in marketing efforts in Massachusetts and likely will continue to do so. Whether those efforts would have any collateral effect on Charter's use of a fiber meet point is debatable, but what is not open to debate is that Charter alone controls its own marketing efforts and decisions, and thus is the dominant factor, if not literally the sole possible factor, in the amount of traffic that is exchanged over a fiber meet arrangement. The point Charter wishes to make has no merit, but in any event does not depend on the data sought here.

Data Request No. 1.19

Verizon MA has already responded to this Request in full. Because the response contains proprietary information, it has been provided to the Department but not yet to Charter, pending finalization of a protective agreement between the parties. Because Verizon MA has answered this request, Charter's motion is groundless. Because Charter has moved to compel without even reviewing Verizon MA's answer, the motion is premature. For both reasons, the motion should be denied.

Data Request No. 1.21

This Request seeks detailed data regarding any discounts Verizon MA may receive on equipment it purchases to build a fiber meet point. This data has no bearing on any issue in this case. First and foremost, despite Charter's repeated claim to the contrary, the precise cost of building a fiber meet point is not at issue here. This is simply not a case in which Verizon MA has demanded a certain price and Charter objects and claims that Verizon MA could have done the work or provided the equipment for less. None of the eleven issues identified by the parties in the pleadings states such a claim. While Verizon MA has proposed that Charter help defray the cost of building a fiber meet point in certain limited circumstances and has argued that Verizon MA should not bear the risk of Charter underutilizing and possibly even stranding Verizon MA's investment in a fiber meet point, whether that cost is \$30,000 or \$90,000 is immaterial; in all events, Verizon MA should not bear that cost where Charter fails to make the required minimal use of the facility.

In addition, the parties do not dispute – and in fact *agree on* – the estimated costs of building a fiber meet point. Verizon MA's witness estimated that the cost for Verizon MA to build an OC3 fiber meet point ranges from \$60,000 to \$90,000, which includes an estimated \$50,000 to purchase, engineer and install support equipment and between \$10,000 and \$40,000 for materials and labor to install a fiber optic cable to the meet point and a fiber network interface device at the meet point. *See* Testimony of Willett Richter, at 5. Likewise, Charter's witness, Mr. Cornelius, estimated that the cost to Charter merely for the facilities needed to build fiber meet points in LATAs 128 and 126 would be approximately \$76,000 and \$25,000 respectively. *See* Testimony of Mike Cornelius, at 21-22. Mr. Cornelius expressly excluded from his figures the additional costs of "labor, engineering and other administrative expenses."

Id. at 22. When these costs are taken into account, it is clear that there is no actual dispute between the parties as to the cost of building a fiber meet point.

Moreover, Verizon has already provided the cost of the equipment it would likely use in an OC3 meet point arrangement (*see* Verizon's proprietary response to Charter 1.19) and additional estimated costs of building a fiber meet point (*see* Verizon's proprietary response to Charter 1.22). To narrow these estimates down to precise figures, as Charter seeks to do with its discovery, serves no purpose and, in any event, is impossible, because both parties also agree that the exact costs depend in large part on such unknown variables as the amount of labor needed to build a particular fiber meet point and the precise location of the meet point.

Data Request No. 1.22

Verizon MA has already responded to this Request in full. Because the response contains proprietary information, it has been provided to the Department but not yet to Charter, pending finalization of a protective agreement between the parties. Because Verizon MA has answered this request, Charter's motion is groundless. Because Charter has moved to compel without even reviewing Verizon MA's answer, the motion is premature. For both reasons, the motion should be denied.

In addition, as explained with regard to Request No. 1.21, above, the exact cost of building a fiber meet point is not at issue in this proceeding, and Charter's Request seeks information that falls outside the permitted scope of discovery.

Data Request No. 1.23

By this Request, Charter seeks Verizon MA's costs of interconnecting with Charter via leased facilities or collocation arrangements. The Request, however, is overly vague and ambiguous because it offers none of the specific facts regarding any such leased facilities (such

as the type and location of the hypothetical leased facility or the location, size and type of collocation). Charter concedes in its motion that the Request is too vague for Verizon MA to answer, at least with respect to collocation. Motion at 17. With respect to leased facilities, Charter apparently specifies in the motion, for the first time, that this Request seeks Verizon MA's costs for the actual facilities Charter is currently leasing from Verizon MA. *Id.* Charter claims that such data "goes to the question of whether Verizon has any incentives to avoid moving to a fiber meet point arrangement with Charter," *id.* at 16, and speculates that Verizon MA might have such an incentive if it is "currently generating revenues by interconnecting with Charter." *Id.*

Charter's argument is patently manufactured solely to impose burdensome and useless make-work on Verizon MA and increase Verizon MA's arbitration costs. Since Charter is currently leasing facilities from Verizon MA, it goes without saying that those facilities "are generating revenue." Whether the rates for those special access facilities actually generate revenues greater than Verizon MA's cost of service (which is what Charter is really getting at) often depends, however, on how long the CLEC (in this case Charter) leases the facility. Certainly, Verizon MA's tariffed rates are designed and intended to allow it to at least recover its costs, and other than in the case of promotions, the Department and the FCC do not approve Verizon's tariffed rates that are not designed to recover Verizon's costs. Given these circumstances, Charter has no need for the actual costs incurred by Verizon MA in provisioning the specific services Charter leases from Verizon MA today, and there is no need to put Verizon MA to the effort to provide such useless data here.

Finally, Charter's entire speculation theory that Verizon MA's negotiating position in this case is a mere pretext to prevent Charter from terminating profitable leased access facilities in

favor of a fiber meet is simply a fantasy that has no support in the record, including in any testimony offered by Charter, and should offer no basis for this kind of fishing expedition in discovery. Charter, not Verizon MA, chose to lease facilities from Verizon MA, over other available means of interconnection. Likewise, Verizon MA's motivation in seeking a minimum traffic threshold and other terms in the proposed fiber meet amendment has no bearing on whether those terms are reasonable in and of themselves.

Data Request No. 1.30

The Request asks Verizon MA to “identify the amount of Verizon’s stranded investment in Massachusetts.” Of course, such a figure is immaterial to any issue in this case. Charter claims that the value of Verizon MA’s stranded investment is relevant here because Verizon MA, through its proposed traffic threshold provisions, seeks to avoid stranded investment in any new fiber meet point it builds at Charter’s request. Motion at 17. But whether Verizon MA currently has only a small amount of stranded investment in the state or a large amount, it is still entitled to avoid *additional* stranded or underutilized investment, and the Department should support efforts to avoid *additional* stranded underutilized investment as a matter of good public policy and efficient operation of the network at reasonable rates. The possible existence of stranded investment in Verizon MA’s network should not in any way doom Verizon MA to ever-increasing amounts of stranded investment as a result of actions (or inactions) of third parties such as Charter.

Not only is the data requested not relevant to any issue in this case nor reasonably calculated to lead to discoverable evidence, but Verizon MA has already stated that producing the data would require an extensive special study. *See* Verizon MA Response to Request 1.30. Charter belittles the effort involved in such a study – “Surely it cannot be true that ... Verizon

does not have the accounting records to identify any so-called stranded investment.” Motion at 18. Verizon MA, however, has claimed no such thing. It may well have accounting records from which such a figure could be derived or estimated, with investment of time and resources and on appropriate conditions, limitations and accountants’ footnotes. This arbitration, however, is not a free pass for Charter to force Verizon MA to undertake vast studies to yield data with no probative value, and the time limitations imposed by the Act on this case indicate that such time consuming efforts are neither fitting nor required here.

Document Request 5

By this Request, Charter seeks all documents concerning Verizon MA’s costs of building the existing fiber meet points in Massachusetts. As explained above with respect to Request 1.21, however, the precise cost of building a fiber meet point for Charter is not at issue here and is not susceptible to ascertainment in this proceeding because necessary details as to the particular arrangements to be built have not yet been determined. Moreover, because the cost of building a fiber meet point depends on the particular circumstances of each installation, the costs of building a given existing fiber meet point will provide nothing more than a general estimate of the costs Verizon MA will expect to incur in building a fiber meet point at Charter’s request. In any event, as noted above, the parties do not disagree as to the general estimated costs of building such facilities, such that the data sought here is relevant only to an issue that is not in dispute.

Data Request 1.15

This Request asks Verizon MA to identify every instance in which it deployed an OC3 system or any individual fiber optic facilities and later re-deployed them to another location. Once again, Charter seeks to enforce the broadest possible request, for data with no bearing on

the issues at hand. Charter claims this data is relevant to Verizon MA's cost of building a fiber meet point. As noted above, the precise amount of such costs is not relevant here, and the parties agree on general estimates of such costs.

In addition, the particular data sought here has no bearing on this case and has no prospect of leading to the discovery of admissible evidence. Charter speculates that if Verizon is capable of redeploying facilities, and "if it does in fact do so," then its costs of building a fiber meet point would be reduced. That may or may not be so, but past instances in which Verizon MA has redeployed its facilities does not indicate in any way whether such redeployment would be available and appropriate in building the two fiber meet points Charter seeks in Massachusetts. Furthermore, even if Verizon MA were able to redeploy equipment and thus reduce the cost of building a fiber meet point (compared to purchasing all equipment new), that "savings" has no bearing whatsoever on the issue at hand here – whether and in what circumstances Charter should bear that cost.

Charter again disputes Verizon MA's statement that the data requested is not tracked in any centralized system that would allow Verizon MA to respond to the request. Charter states that "The response to this request does not require reference to a database, but can instead be [sic] addressed by the appropriate personnel with responsibility for network deployment in Massachusetts." Motion at 20. Charter does not seem to grasp that data that Verizon MA can more readily produce data stored in a database than information that must be gathered by interviewing, in this case, all personnel with responsibility for deploying facilities in Massachusetts, presumably including all Verizon MA linemen, who might have removed a fiber optic component from one junction box, splice or other plant, and re-installed it elsewhere, and

all Verizon MA central office personal, who may have re-arranged multiplexing equipment in a C.O. The Department should ignore Charter's speculation and deny the motion.

Data Request 1.28

Here, Charter asks whether Verizon MA has on hand certain equipment that is of the type that would be used to build a fiber meet point for Charter. Verizon MA has answered the request by explaining that "such equipment is typically ordered on a per-job basis and at any point in time Verizon undoubtedly would have some or all of the listed equipment in its possession in a staging area or warehouse pending installation." Verizon MA Response to Charter Request 1.28.

Charter, however, is not content with this response and now seeks to compel Verizon MA to search its warehouses and other facilities and state whether it "currently has in its possession the identified equipment." Motion at 22. Charter's demand is simply ridiculous. Whether Verizon MA has any such equipment "in its possession" today has no bearing on whether it will have such equipment in its possession in the future, when it comes time to build a fiber meet point to serve Charter. Second, Verizon MA's answer to this request clearly states that it generally orders such equipment "on a per-job basis," so that if it does have any such equipment in its possession in the future, that equipment likely will be earmarked for another job. Third, even if such equipment were available "in stock" to use on a Charter project, the cost of the equipment would nevertheless be included in the cost of building the Charter fiber meet point. Finally, that cost is not relevant to this case, and data which is sought solely to lead to the discovery of admissible evidence on that point is beyond the pale.

Data Requests 1.14, 1.17 and 1.24-1.27 and Document Requests 2, 3 and 4

In these requests, Charter seeks nothing less than the location of all fiber facilities Verizon MA has installed anywhere in the state. Charter also demands, in Request 1.17, that

Verizon MA identify those communities in which it currently offers FiOS service. Charter also demands to know Verizon MA's planned expansion of FiOS service over the next two and a half years. Charter says its requests boil down to this: "identify where your fiber is located." But the location of Verizon MA's fiber is not even remotely relevant to any issue in this case. Charter's sole interest in these Requests is to exploit the discovery process to obtain highly sensitive, commercially valuable data showing where Verizon MA intends to compete with Charter in its core video business, by offering FiOS and FiOS TV.³

Charter's argument that this data is relevant to determining the cost of building a fiber meet point, Motion at 22, is groundless, for the reasons fully set forth above. The precise cost of construction is not at issue here. Charter's apparent position that there is a present dispute between the parties over Verizon MA's cost of building a particular fiber meet is simply incorrect. Only when the parties identify the locations for those fiber meet points – which has not yet occurred and which will not occur until after this case is resolved and the parties sign an agreement – will Verizon MA identify any spare fiber that might be available to minimize the need to install new fiber to serve those points. *See* Verizon MA Response to Petition, Exhibit 2, § 2.3, at 4, in which Verizon MA proposes contract language confirming this practice. Only then will the parties be in a position to agree on or dispute whether Verizon MA has properly identified its spare fiber. But there can be no such dispute now. Thus, Charter is not entitled to discover the location of any fiber facilities in this case. In any event, even if the parties were to agree on the location of the fiber meet points (which they have not) and disagree on whether spare fiber is available (which they do not), Charter would be entitled, at most, to discovery as to

³ Contrary to Charter's assumption, Motion at 24, the protective agreement under discussion by the parties would not render Verizon MA's objection on the ground of confidential and proprietary data moot. That prospective agreement, while adequate to protect much confidential information, does not afford sufficient protection for the highly sensitive data regarding Verizon MA's plans to provide FiOS service in the future.

the availability of fiber to serve those two locations only. In no event would Charter be entitled to require Verizon MA to provide the locations of *all fiber facilities in the entire state*.⁴

Charter's claim that this data is relevant to the issue of Verizon MA's proposed distance limitations is likewise groundless. *See* Motion, at 22. Charter hypothesizes that, "If Verizon has already deployed fiber in many different locations in Massachusetts then it would seem unnecessary to arbitrarily limit Verizon's obligations to deploy such fiber as Verizon proposes." *Id.* This simply makes no sense. Verizon's proposed 500 foot limit is a limit on constructing or deploying new fiber only. Thus, the existence of spare fiber might reduce the cost of constructing a fiber meet point (by reducing the length of new fiber that must be installed), but it doesn't obviate the need for Verizon MA's reasonable limitation. Whether spare fiber exists or not, Verizon MA still should not be required to construct unlimited new fiber facilities to connect its existing fiber (wherever that may be) to a fiber meet point location. Nor should Verizon MA be required to devote an unlimited amount of its existing spare fiber for use in a fiber meet arrangement with Charter or any other carrier. In fact, the FCC has already ruled that incumbent carriers are only required to make a "reasonable accommodation" of fiber optic cable for a fiber meet arrangement and that state commissions should "determine the appropriate distance that would constitute the required reasonable accommodation of interconnection." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 ¶553 (1996) (subsequent history omitted).

⁴ The motion, at 24, claims that "it is unimaginable" that Verizon MA wouldn't have this data handy for distribution. As any CLEC seeking to lease dark fiber from Verizon MA is well aware, such requests often require ample research by Verizon MA to determine whether it has spare fiber available on a particular route. To perform such work for the entire state would be a monumental task.

WHEREFORE, the Department should deny Charter's motion.

Respectfully submitted,

VERIZON NEW ENGLAND INC.

By its attorneys,

/s/ Alexander W. Moore

Bruce P. Beausejour
Alexander W. Moore
185 Franklin Street – 13th Floor
Boston, MA 02110-1585
(617) 743-2265

James G. Pachulski
TechNet Law Group, P.C.
1100 New York Avenue, NW
Washington, D.C. 2005-3934
(202) 589-0120

Dated: August 28, 2006